

OCT 06 2003

Michael N. Milby, Clerk

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES
LITIGATION

§ Civil Action No. H-01-3624
§ (Consolidated)

§

§ CLASS ACTION

This Document Relates To:

MARK NEWBY, et al., Individually and On
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

ENRON CORP., et al.,

Defendants.

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA, et al., Individually and On Behalf
of All Others Similarly Situated,

Plaintiffs,

vs.

KENNETH L. LAY, et al.,

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO
MOTION TO DISMISS FILED BY
DEFENDANT CIBC WORLD MARKETS PLC

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Lead Plaintiff hereby respectfully submits this Opposition to the motion to dismiss filed by CIBC World Markets plc (“CIBC plc”).

I. INTRODUCTION

CIBC plc separately moved to dismiss and incorporated the arguments made by the other CIBC defendants in a motion filed June 18, 2003. Lead Plaintiff responded to the arguments made by the other CIBC defendants in its Opposition to the Bank Defendants filed on July 17, 2003 (“Omnibus Opposition”).¹ This Opposition responds to those arguments which CIBC plc expressly claims in “further support of its Motion.” Motion at 2. Those arguments, too, were addressed by Lead Plaintiff, and fail just as their predecessors.

II. ARGUMENT

A. CIBC plc Is *Not* Only Named in the Fourth Claim for Relief, But Also Is Named as a Defendant for Violations of §10(b)

CIBC plc asserts: “CIBC World Markets plc is named as a defendant only in plaintiff’s Fourth Claim for Relief (‘Count IV’).” Motion at 2. That is incorrect. CIBC plc is named as a defendant in Count I of the plaintiffs’ First Amended Complaint, for violations of §10(b) of the Securities Exchange Act of 1934. Indeed, Count I specifically names CIBC, which is a defined term including CIBC plc. *See* ¶103(a). That Count I applies to CIBC plc is also demonstrated by plaintiffs’ allegations in the body of the First Amended Complaint. For example, Lead Plaintiff alleges: “CIBC World Markets plc – under the control of Canadian Imperial Bank of Commerce – *acted ... to further the defendants’ fraudulent scheme* by acting as the initial purchaser of the Marlin Water Trust II, Marlin Water Corp. II 7/12/01 6.19% Senior Secured Notes due 03.”

¹ Lead Plaintiff hereby incorporates by reference the Omnibus Opposition and pages 32-33 of Plaintiffs’ Memorandum of Law in Opposition to the Deutsche Bank Defendants’ Motion to Dismiss filed on September 25, 2003 (“Deutsche Opposition”).

¶103(c). There can be no doubt that plaintiffs bring fraud claims against CIBC plc under §10(b), pursuant to Count I of the First Amended Complaint.

CIBC plc is subject to liability pursuant to Rule 10b-5(a) and (c) for its role in selling approximately \$1 billion Marlin Notes in June 2001. ¶¶103(c), 641.37-641.41. As Lead Plaintiff alleges, Enron's need for cash made access to the capital markets a crucial element of keeping the Ponzi scheme going. ¶¶18-20, 48-49. And this Court has already determined that Lead Plaintiff's allegations as to this part of the scheme properly state a claim. *See In re Enron Corp. Sec. Litig.*, 235 F. Supp. 2d 549, 613 (S.D. Tex. 2002); *see also id.* at 702. Through the Marlin Notes, CIBC plc and those who directed its actions played an important role in the scheme. Thus, CIBC plc is subject to liability for violations of Rule 10b-5(a) and (c), which damaged the class of investors in Enron's publicly traded securities.

CIBC plc is also subject to liability pursuant to Rule 10b-5(b) for making false and misleading statements during the Class Period. CIBC plc sold securities by way of false statements included in the selling documents for the Marlin Notes. ¶¶641.37-641.41. By July 2001, the date of these sales, CIBC plc was well aware of Enron's false financial statements and deteriorating financial condition. *See* ¶¶715-734.

B. The First Amended Complaint Properly States Claims for Violations of §12(a)(2)

CIBC plc argues that plaintiffs do not have standing to bring a §12(a)(2) claim. *See* Motion at 2-4. According to CIBC plc, "only *actual* purchasers of the Marlin Notes" can represent a class of investors bringing §12(a)(2) claims. *Id.* at 3 (emphasis in original). *First*, plaintiffs are represented by an "actual" purchaser of Marlin Notes. *See* Imperial County Employees Retirement System's and IHC Health Plans, Inc.'s Motion to Intervene Under Fed. R. Civ. P. 24(b)(2) filed on August 27,

2003 (plaintiff Imperial County Employees Retirement System purchased Marlin Notes on July 12, 2001).² **Second**, purchasers of the Marlin Notes do not necessarily need to be represented by a purchaser of the Marlin Notes. This Court cited approvingly numerous cases holding, in substance or effect, that ““a class of plaintiffs who purchased different types of securities may properly be certified with a representative party who only purchased one type of security.”” *In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 445 (S.D. Tex. 2002) (citation omitted). Thus, the Court has already rejected the position CIBC plc now argues.

CIBC plc claims that the remedy of **rescission** is not available to plaintiffs because the Marlin Notes were sold in a private offering. Motion at 4. In *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995), “the Supreme Court analyzed the legislative history of the 1933 Act to determine that Congress meant for §12 to apply only to public offerings.” *Lewis v. Fresne*, 252 F.3d 352, 357 (5th Cir. 2001). As Lead Plaintiff has demonstrated, the First Amended Complaint states facts demonstrating Marlin and the other Enron-related debt securities were sold in public offerings. See Omnibus Opposition at 40-48; Deutsche Opposition at 32-33.³

CIBC plc lastly asserts that “plaintiffs’ Section 12(a)(2) claim is barred by the one year statute of limitations under Section 13 of the 1933 Act,” and bases its assertion on arguments other

² In addition, plaintiffs’ §10(b) claims against CIBC plc are brought on behalf of all the investors in Enron’s publicly traded securities – and numerous Class Representatives surely have standing to bring valid §10(b) claims on behalf of the Class.

³ Moreover, concerning plaintiffs’ §10(b) claims, those claims apply to both public and private sales of securities. See, e.g., *Wachovia Bank & Trust Co., N. A. v. National Student Marketing Corp.*, 650 F.2d 342, 354 (D.C. Cir. 1980) (“The broad scope of section 10(b) has been widely recognized, and the section has been applied to newly issued securities and to those sold in **private** placements.”) (emphasis added); see also *Woolf v. S. D. Cohn & Co.*, 515 F.2d 591, 607 (5th Cir. 1975) (“Under any view of how far 10b-5 should extend, the area of private offerings of securities under the exemption afforded by §4(2) of the 1933 Act is so closely related to the fairness of the public and private securities markets and the allocation of investment capital that it must come within the scope of the rule.”), *vacated on other grounds*, 426 U.S. 944 (1976).

defendants previously raised. Motion at 4. The claim is timely, as plaintiffs have already demonstrated. *See* Omnibus Opposition at §§II-III. Furthermore, CIBC plc's involvement in the fraud was only recently disclosed by the filing of the First Amended Complaint. Previously, CIBC plc's role remained substantially hidden from the media and investors. Thus, CIBC plc does not (and cannot) establish that a reasonable investor was put on notice of the asserted claims against CIBC plc prior to May 14, 2003.

III. CONCLUSION

For all the reasons stated, CIBC plc's motion to dismiss should be denied.

DATED: October 6, 2003

Respectfully submitted,

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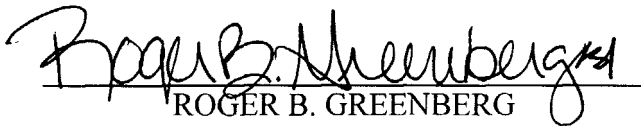
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS FILED BY DEFENDANT CIBC WORLD MARKETS PLC document has been served by sending a copy via electronic mail to serve@ESL3624.com on this 6th day of October, 2003.

I further certify that a copy of the foregoing PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS FILED BY DEFENDANT CIBC WORLD MARKETS PLC document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this 6th day of October, 2003.

Carolyn S. Schwartz
United States Trustee, Region 2
33 Whitehall Street, 21st Floor
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A handwritten signature in cursive script, reading "Mo Maloney", written in black ink.

Mo Maloney